

Discrimination (Raytheon Australia Pty Limited) Exemption 2012 (No 1)

Notifiable instrument NI2012–313

made under the

Discrimination Act 1991, section 109 (Grant of exemptions) and *ACT Civil and Administrative Tribunal Act 2008*, section 69 (2)

1 Name of instrument

This instrument is the *Discrimination (Raytheon Australia Pty Limited) Exemption 2012 (No 1)*.

2 Exemption decision—ACT Civil and Administrative Tribunal Act, s 69 (2) (a)

The attached order of the ACAT is taken to be a decision of the Human Rights Commission under the *Discrimination Act 1991*, section 109 (Grant of exemptions).

3 Commencement—ACT Civil and Administrative Tribunal Act, s 69 (2) (b)

This instrument is taken to have commenced on the date of the attached order.



Human Rights and Discrimination Commissioner

Date 12 June 2012

AUSTRALIAN CAPITAL TERRITORY)
CIVIL AND ADMINISTRATIVE TRIBUNAL)

NO: AT 11/136

RE: RAYTHEON AUSTRALIA PTY LIMITED
Applicant

AND: ACT HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER
Respondent

**CONSENT DECISION PURSUANT TO SECTION 55 OF THE
ACT CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 2008 (ACT)**

Tribunal : Professor P Spender – Presidential Member

Date : 8 June 2012

Whereas –

- a. the parties have reached an agreement as to the terms of a decision of the Tribunal that is acceptable to them; and
- b. the terms of the agreement have been reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and
- c. the Tribunal is satisfied that a decision consistent with those terms would be within the powers of the Tribunal;

by consent, the Tribunal makes orders in the terms of the agreement signed by the parties and annexed hereto as Attachment A.


.....
Professor P Spender
Presidential Member

"A"

AUSTRALIAN CAPITAL TERRITORY
CIVIL AND ADMINISTRATIVE TRIBUNAL

NO. AT 11/136

CONSENT AGREEMENT BETWEEN
RAYTHEON AUSTRALIA PTY LIMITED

AND

ACT CIVIL AND ADMINISTRATIVE TRIBUNAL
RECEIVED
10 MAY 2012
No.
AUSTRALIAN CAPITAL TERRITORY

ACT HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

RECITALS

- (a) Raytheon Australia Pty Limited (**Raytheon Australia**) is ultimately owned by Raytheon Company and is engaged in providing mission systems integration as well as defence and security solutions for sea, land, air and office environments. Raytheon Australia's primary customer is the Commonwealth of Australia through the Department of Defence.
- (b) Raytheon Australia has facilities throughout Australia with corporate headquarters located in the Australian Capital Territory. As part of its ordinary business activities in Australia, Raytheon Australia has entered into various contracts with the Commonwealth of Australia, as represented by the Department of Defence, as well as other companies in Australia and the United States of America (**US**) to provide defence-related goods and services to be used ultimately by the Australian Defence Forces (**the Contracts**).
- (c) The transfer and use of defence technologies, technical data and services of US origin are regulated by the *Arms Control Export Act 22 USC § 2778 (2004) (USA) (Arms Control Act)* to control the export and import of US origin defence articles and defence services. These controls are implemented through the *International Traffic in Arms Regulations 22 CFR § 120 (2003) (USA) (ITAR)* which restrict the transfer of certain defence articles, technical data and defence services (**ITAR controlled material**) outside the US and to non-US persons. The Directorate of Defence Trade Controls (**DDTC**) is the agency responsible for administering the ITAR within the US Department of State.
- (d) In order to fulfil its obligations under the Contracts it is necessary for Raytheon Australia to obtain access to ITAR controlled material from US companies, including its ultimate parent, Raytheon Company, and from US Government agencies. Access is subject to authorisation granted by the DDTC in the form of licences, Technical Assistance Agreements (**TAA**s) and Manufacturing Licence Agreements (**MLA**s) (collectively **the Agreements**).

- (e) Raytheon Australia is contractually bound under the Agreements to comply with the provisions of the ITAR and only allow individuals to access ITAR controlled material if they are authorised under the ITAR.
- (f) In August 2011 changes to the ITAR came into effect allowing applicants such as Raytheon Australia to transfer ITAR controlled material to their dual national or third country national 'regular employees' so long as effective procedures are in place to prevent the diversion of ITAR controlled materials to unauthorised parties or destinations or for unauthorised purposes. However, this amendment applies only to 'regular employees' and does not extend to contract workers. Also, it does not have retrospective application to existing agreements entered into before 15 August 2001. Therefore, in order to determine an individual's eligibility to access ITAR controlled material and otherwise comply with its obligations under the ITAR for existing agreements Raytheon Australia must obtain certain nationality related information from job applicants, employees and contract workers in the ACT.
- (g) In order to comply with its obligations pursuant to the Agreements, Raytheon Australia must establish security systems sufficiently rigorous to satisfy the US Government and the Australian Defence Force that these conditions are being satisfied.
- (h) In particular, Raytheon Australia must ensure that unauthorised re-export or re-transfer of the ITAR controlled material does not occur, for example by disclosure to a person of a nationality not identified and authorised in the relevant Agreement or to a person of a proscribed nationality.
- (i) If Raytheon Australia does not comply fully with the obligations imposed on it, serious and significant consequences could result, including it being prevented from working on contracts already in place or under tender, and from competing for future contracts which involve classified information. In addition, any breach by Raytheon Australia of its contractual obligations to US Contractors could result in the imposition of penalties. Any of these consequences would be detrimental to Raytheon Australia's business in Australia.
- (j) In order for Raytheon Australia to comply with its mandatory ITAR related contractual obligations, it may be necessary for it to engage in conduct which may contravene certain provisions of the *Discrimination Act 1991* (ACT) (**the Act**).
- (k) On 12 August 2008 the ACT Administrative Appeals Tribunal granted an exemption to Raytheon Australia under section 109(1) of the Act.
- (l) On 20 July 2011 Raytheon Australia applied to the ACT Human Rights and Discrimination Commissioner (**the Commissioner**) for an exemption for a further three years. On 29 July 2011 the Commissioner advised that an exemption had recently been agreed with BAE Systems Australia (**the BAE Exemption**) and on 30 August 2011 the Commissioner

granted Raytheon Australia a three month exemption on the same terms as the BAE Exemption.

- (m) On 15 November 2011 Raytheon Australia wrote to the Commissioner setting out reasons objecting to the terms of the temporary exemption. On 1 December 2011 the Commissioner granted Raytheon Australia a three year exemption on the same terms as the temporary exemption.
- (n) On 22 December 2011 Raytheon Australia made application for review of the decision under section 110 of the Act in proceedings 11/136.
- (o) Following mediation and extensive discussions, the parties have reached an agreement on the terms of an exemption under section 109 of the Act. The parties agree that the correct and preferable decision is to now grant the exemption under section 109 of the Act on the following agreed terms.

AGREED TERMS

Pursuant to section 109 of the Act, the Tribunal grants Raytheon Australia Pty Limited (**Raytheon Australia**) an exemption from the operation of sections 10, 13, 23 and 69 of the Act subject to the following terms:

CONDUCT

Raytheon Australia may engage in the following conduct in the Australian Capital Territory:

Security Officer and Assistant Security Officer

1. Request nationality or citizenship information from any person holding or applying to hold the positions of Security Officer or Assistant Security Officer (as defined in the Australian Defence Security Manual) within Raytheon Australia.
2. Require any person holding the positions of Security Officer or Assistant Security Officer within Raytheon Australia to be an Australian citizen.

Australian security clearances

3. Record information relating to security clearances granted to employees of Raytheon Australia (**employees**) and employees of contractors who perform work on Raytheon Australia's premises and who are subject to Raytheon Australia's control and direction (**contract workers**).

Applicants for employment

4. Inform applicants for employment in roles which will require access to material (**ITAR controlled material**) subject to contractual obligations arising from the *Arms Export Control Act 22 USC § 2778 (2004)*, *International Traffic in Arms Regulations (ITAR)* and the *Export Administration Regulations* and any permit, licence or approval granted, or agreement made, under those laws (**ITAR controls**) that they may be adversely affected by ITAR controls or Australian security clearance procedures if they are not an Australian citizen or if they hold dual nationality and / or citizenship.

Request for information about nationality

5. Request nationality-related information from job candidates whose role is likely to require access to ITAR controlled material, providing this request for information is limited to information for determining whether an application for authorisation would be required to allow the job candidate to have that access and whether in Raytheon Australia's reasonable judgment that application would have significant prospects of success.

Use of nationality information

6. Impose a condition on any offer of employment in roles which are likely to require access to ITAR controlled material that the person must, pursuant to ITAR controls, be authorised to access that material whether pursuant to an individual approval obtained from the United States Department of State or otherwise.
7. Take into account the nationality-related information pertaining to an employee or contract worker when determining whether that person may be offered a role or allocated work that involves access to ITAR controlled material.
8. Request nationality-related information from, and maintain records of the nationalities of, employees and contract workers who have or may have access to ITAR controlled material.
9. Implement systems designed to ensure that ITAR controlled material is disclosed only to persons who are authorized by ITAR controls to receive it.
10. Impose limitations or prohibitions on access to ITAR controlled material on persons not authorised to access that material.
11. Establish security systems that are designed to prevent the unauthorized re-export or re-transfer of ITAR controlled material.
12. If and when required by ITAR, disclose to:
 - (a) Other parties with which Raytheon Australia works or proposes to work under contract, where that work requires access to ITAR controlled material;
 - (b) the United States Department of State;
 - (c) the United States Department of Commerce; and
 - (d) the United States Department of Defence;

the nationality-related information of all employees and contract workers who have or are likely to have access to ITAR controlled materials in the performance of the contracted work.

CONDITIONS

1. The exemption applies only to Raytheon Australia's conduct where:
 - (a) it is necessary to enable it to obtain and manage ITAR export licensing or to perform contractual obligations which involve access to ITAR controlled material;
 - (b) it has taken all steps that are reasonably available to avoid engaging in conduct which would otherwise be in breach of sections 10, 13, 23 and 69 of the Act, including:
 - (i) reliance on ITAR exemptions, exceptions or other provisions, including clause 126.18 of ITAR, where applicable;
 - (ii) where employment job candidate, employee or contract worker is a national or dual national of a country not approved for access to ITAR-controlled material, then Raytheon Australia will either request the Department of State, or request the

relevant export license holder(s) to request the Department of State to amend the relevant export licenses to enable the person to have access to ITAR-controlled material, unless Raytheon Australia, on reasonable grounds, determines that either:

- (A) the job candidate, employee or contract worker is not the best candidate for the position; or
- (B) such an application does not have significant prospects of success.

and

- (iii) in the event that the United States Department of State requires Raytheon Australia to provide further information specific to the person, then with the consent of that person, Raytheon Australia will work with the person to supply all relevant information to the United States Department of State so that an application for approval may be made in relation to that person.

2 Raytheon Australia is required to exercise its best endeavours to bring about the inclusion, in all contracts or agreements to which it is party which involve ITAR controlled material the clauses implementing section 126.18 of the ITAR, or other clauses of similar effect that may be implemented during the term of these orders. To this end, Raytheon Australia will:

- (a) within three months request the export license holders to amend the licenses to include relevant ITAR provisions that would provide authorisation for third or dual national regular employees to access relevant ITAR controlled material; and
- (b) use best endeavours to ensure that the relevant export license holders comply with Raytheon Australia's request to incorporate the relevant ITAR provisions.

3. Where, pursuant to this exemption, Raytheon Australia wishes to reserve the right to make a conditional offer of employment in relation to a position which will or may involve access to ITAR-controlled material, any advertisement, invitation for expressions of interest, or other promotional information referring to the position must include the information that:

- (a) the position will or is likely to require access to ITAR controlled material and that any person occupying the position must be able to satisfy ITAR-based requirements which may require specific authorisation for that person to access ITAR-controlled material; and
- (b) if a job candidate is concerned as to whether or not they will satisfy the requirement in (a), they should contact a nominated employee of Raytheon Australia who is able to provide relevant information, including information set out in condition 4 below.

4. Raytheon Australia must specifically communicate to job candidates, employees and contract workers:

- (a) express notice that they may be adversely affected by the ITAR requirements if they are not an Australian national, if they hold dual nationality citizenship and /or citizenship, or if they are not of Australian national origin;
- (b) notice that Raytheon Australia has an exemption under the Act to enable it to take steps to prevent access to ITAR controlled material;
- (c) a reasonable explanation in plain English of the nature of any such adverse effects;
- (d) advice that any necessary application for specific authorisation for a person to access ITAR-controlled material would be made by Raytheon Australia, in appropriate cases;
- (e) information about how they can apply for Australian citizenship; and

- (f) information regarding their rights under Australian Federal, State and Territory discrimination laws.

Raytheon Australia may comply with this Condition 4 through a range of alternatives, including individual written notices, published policy statements, web-based posting or other similar means.

5. Where, pursuant to this exemption, an employee or contract worker who is not authorized pursuant to ITAR controls to have access to ITAR controlled material (including pursuant to any individual clearance), is moved from a job involving access to ITAR controlled material to any other work performed by Raytheon Australia or any of its related entities, Raytheon Australia must, through a duly authorized officer, explain to the person why he or she is being transferred and must otherwise take all reasonable steps to avoid or limit harm or loss to that person.
6. Where Raytheon Australia uses a system of security passes to reflect the fact of access to ITAR controlled material or levels of access to material subject to Australian security restrictions, the passes may be coded but not in such a manner that the nationality can obviously be identified from the coding.
7. All information relating to security passes, security clearance levels and access to ITAR controlled material shall be restricted to the Security Officer, Assistant Security Officer, export control managers, Human Resources managers, legal representatives and other senior managers and to their properly appointed nominees on a "need to know" basis.
8. Raytheon Australia's employment or other relevant policies shall be amended as soon as reasonably possible so as to refer to the terms of this exemption, including all conditions attaching to it, and to make clear that the purpose of Raytheon Australia's request for nationality information is made solely for the purposes of compliance with legal and regulatory obligations imposed pursuant to the defence export control laws of the United States.
9. Raytheon Australia is required to provide a written report to the ACT Human Rights Commission every six months from the date of this instrument of exemption, over the three year period of the exemption, detailing:
 - (a) the steps it has taken to comply with the above conditions, including in particular, conditions 2 and 4;
 - (b) the number of persons affected by this exemption, the nature of the effects, and the steps taken to address any adverse effects;
 - (c) the anti-discrimination training of employees and contract workers provided by Raytheon Australia; and
 - (d) implementation and compliance generally with the terms of this exemption order.

The exemption is granted for a period of three years from the date of the Tribunal's order.

This order is a notifiable instrument and must be notified under the Legislation Act.



SIGNED by the ACT Human Rights and Discrimination Commissioner

Dated

10 May 2012

SIGNED for and on behalf of Raytheon Australia Pty Limited

Allens

Dated *7 May 2012.*